

1 COOLEY LLP
MICHAEL G. RHODES (116127) (rhodesmg@cooley.com)
2 101 California Street, 5th Floor
San Francisco, CA 94111-5800
3 Telephone: (415) 693-2000
Facsimile: (415) 693-2222
4

5 MAZDA K. ANTIA (214963) (mantia@cooley.com)
4401 Eastgate Mall
San Diego, CA 92121-1909
6 Telephone: (858) 550-6000
Facsimile: (858) 550-6420
7

8 Attorneys for Kik Interactive, Inc.

9 UNITED STATES DISTRICT COURT
10 NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

11 MARC OPPERMAN, *et al.*,

12 Plaintiff,

13 v.

14 PATH, INC. *et al.*,

15 Defendant.

Case No. 13-cv-00453-JST

**KIK INTERACTIVE, INC.’S MOTION TO
DISMISS PURSUANT TO FEDERAL
RULES OF CIVIL PROCEDURE 12(B)(1)
AND 12(B)(6)**

DATE: December 2, 2014
TIME: 2:00 p.m.
COURTROOM: 9
JUDGE: Hon. Jon S. Tigar

18
19
20
21
22
23
24
25
26
27
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Table of Contents

	Page
NOTICE OF MOTION AND MOTION TO DISMISS	1
STATEMENT OF RELIEF SOUGHT	1
STATEMENT OF ISSUES TO BE DECIDED	1
I. INTRODUCTION	2
II. STATEMENT OF FACTS	3
III. APPLICABLE LEGAL STANDARDS	4
IV. ARGUMENT	4
A. Plaintiffs Fail to State a Claim for Intrusion Upon Seclusion.....	4
1. Plaintiffs fail to plead that they had a reasonable expectation of privacy in their address books under the circumstances alleged.....	5
2. Plaintiffs fail to plead that Kik’s conduct was highly offensive	8
3. Plaintiffs suffered no harm as a result of Kik’s alleged intrusion.....	11
B. Plaintiffs Lack Article III Standing for Their Intrusion Claim	11
C. Plaintiffs’ Conversion Claim Should Be Dismissed For Failure to State a Claim and for Lack of Article III Standing.....	13
D. Plaintiffs’ Claims Against Kik Should Be Dismissed With Prejudice	13
V. CONCLUSION	14

TABLE OF AUTHORITIES

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Page(s)

Cases

Allen v. City of Beverly Hills,
911 F.2d 367 (9th Cir. 1990).....13

Andrews v. Metro N. Commuter R.R. Co.,
882 F.2d 705 (2d Cir. 1989).....6

In re Apple iPhone Application Litig.,
No. 11-md-02250-LHK, 2011 WL 4403963 (N.D. Cal. Sept. 20, 2011)12

Ashcroft v. Iqbal,
556 U.S. 662 (2009)4, 6

Baugh v. CBS, Inc.,
828 F. Supp. 745 (N.D. Cal. 1993)9

Belluomini v. Citigroup Inc.,
No. 13-cv-01743-CRB, 2013 WL 3855589 (N.D. Cal. July 24, 2013)10

Citizens for Health v. Leavitt,
428 F.3d 167 (3d Cir. 2005).....12

Deteresa v. Am. Broad. Cos., Inc.,
121 F.3d 460 (9th Cir. 1997).....5

In re DoubleClick, Inc. Privacy Litig.,
154 F. Supp. 2d 497 (S.D.N.Y. 2001).....12

Folgelstrom v. Lamps Plus, Inc.,
195 Cal. App. 4th 986 (2011)10

Four Navy Seals v. Associated Press,
413 F. Supp. 2d 1136 (S.D. Cal. 2005)5

Freeman v. ABC Legal Services, Inc.,
827 F. Supp. 2d 1065 (N.D. Cal. 2011)7

In re Google Android Consumer Privacy Litig.,
No. 11-md-02264-JSW, 2013 WL 1283236 (N.D. Cal. Mar. 26, 2013)10, 13

In re Google, Inc. Privacy Policy Litig.,
No. 12-cv-01382-PSG, 2014 WL 3707508 (N.D. Cal. July 21, 2014).....10

In re Google, Inc. Privacy Policy Litig.,
No. C-12-01382-PSG, 2013 WL 6248499 (N.D. Cal. Dec. 3, 2013)8, 13

TABLE OF AUTHORITIES
(continued)

	Page(s)
1	
2	
3	
4	
5	
6	
7	
8	
9	
10	
11	
12	
13	
14	
15	
16	
17	
18	
19	
20	
21	
22	
23	
24	
25	
26	
27	
28	

<i>Hill v. Nat’l Collegiate Athletic Ass’n</i> , 7 Cal. 4th 1 (1994)	8
<i>In re iPhone Application Litig.</i> , 844 F. Supp. 2d 1040 (N.D. Cal. 2012)	10
<i>LaCourt v. Specific Media, Inc.</i> , No. 10-cv-1256-GW(JCGx), 2011 WL 1661532 (N.D. Cal. Apr. 28, 2011)	12
<i>Low v. LinkedIn Corp.</i> , 900 F. Supp. 2d 1010 (N.D. Cal. 2012)	10, 13
<i>Lujan v. Defenders of Wildlife</i> , 504 U.S. 555 (1992)	4
<i>Miller v. Nat’l Broad. Co.</i> , 187 Cal. App. 3d 1463 (1986).....	4, 8
<i>Owens v. Kings Supermarket</i> , 198 Cal. App. 3d 379 (1988).....	6
<i>Plascencia v. Lending 1st Mortg.</i> , 583 F. Supp. 2d 1090 (N.D. Cal. 2008)	7
<i>Puerto v. Super. Ct.</i> , 158 Cal. App. 4th 1242 (2008)	10
<i>Robinson v. Salazar</i> , 885 F. Supp. 2d 1002 (E.D. Cal. 2012).....	6
<i>Ruiz v. Gap, Inc.</i> , 380 Fed. App’x. 689 (9th Cir. 2010).....	12
<i>Sanchez-Scott v. Alza Pharm.</i> , 86 Cal. App. 4th 365 (2001)	5
<i>Shulman v. Grp. W Prods., Inc.</i> , 18 Cal. 4th 200 (1998)	4
<i>In re Yahoo Mail Litig.</i> , No. 13-cv-04980, 2014 WL 3962824 (N.D. Cal. Aug. 12, 2014)	11
<i>Yunker v. Pandora Media, Inc.</i> , No. 11-cv-031130JSW, 2013 WL 1282980 (N.D. Cal. Mar. 26, 2013)	10, 12

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF AUTHORITIES
(continued)

Page(s)

Other Authorities

Alexis Tsotsis, *Speedy Messaging App Kik Goes Viral, But Is It Cool With Apple’s TOS?* 7

California Civil Jury Instructions § 1800.....11

Federal Rule of Civil Procedure 12(b)(1)1, 2, 4

Federal Rule of Civil Procedure 12(b)(6)1, 2, 4, 7, 13

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

NOTICE OF MOTION AND MOTION TO DISMISS

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on December 2, 2014 at 2:00 p.m., or as soon thereafter as this motion may be heard in the above-referenced court located at 450 Golden Gate Avenue, San Francisco, CA 94102, Courtroom 9, 19th Floor, Kik Interactive, Inc. (“Kik”) will and hereby does move to dismiss the Second Consolidated Amended Class Action Complaint (“SCAC” (Dkt. No. 478)). This motion is made under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) and is based on this Notice of Motion and Motion, the accompanying Memorandum of Points and Authorities, the Declaration of Peter Heinke, pleadings on file, oral argument of counsel, and such other materials and argument as may be presented and appropriately considered in connection with this motion.

STATEMENT OF RELIEF SOUGHT

Kik seeks an order dismissing with prejudice Plaintiffs’ SCAC and each of the claims alleged therein for failure to state a claim upon which relief can be granted and because Plaintiffs have not met their burden to show Article III standing.

STATEMENT OF ISSUES TO BE DECIDED

1. Should Plaintiffs’ claims against Kik for invasion of privacy (intrusion upon seclusion) and conversion be dismissed under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted?
2. Should Plaintiffs’ claims against Kik for invasion of privacy (intrusion upon seclusion) and conversion be dismissed under Federal Rule of Civil Procedure 12(b)(1) for failure to allege Article III standing?

1 **I. INTRODUCTION**

2 The Kik Messenger Application (“App”) is a free smartphone messenger that gives users a
3 fast and simple way to connect with each other. Plaintiffs allege that shortly after the App’s
4 launch in late October 2010, several sources—including the press and Kik itself—disclosed that
5 the App accessed certain data fields (phone number and email addresses) from users’ address
6 books to let users know which of their iDevice contacts also used Kik Messenger. Indeed, the
7 many public disclosures and statements regarding Kik’s address book data collection practices
8 have formed the basis of each of Plaintiffs’ five attempts to state claims against Kik arising from
9 their use of its App. These very allegations, however, negate Plaintiffs’ claims. While Plaintiffs
10 now characterize Kik’s acts as a surreptitious misappropriation of highly sensitive and valuable
11 information, their own factual allegations reveal that Kik’s access to portions of address book
12 data was publicly disclosed, involved only basic address book data fields that were neither
13 inherently sensitive nor valuable, and took place so that users could fully benefit from the App’s
14 functionality. These admissions defeat Plaintiffs’ claims for invasion of privacy (intrusion upon
15 seclusion) and conversion on both Rule 12(b)(6) and Rule 12(b)(1) grounds.

16 First, Plaintiffs’ intrusion claim depends on Plaintiffs’ possessing an actual and reasonable
17 expectation that the Kik Messenger App would not access their address book data. Plaintiffs have
18 failed to plead they had any such expectation given their citation to numerous public statements
19 made by Kik, third parties, and the press almost immediately after the App’s launch disclosing
20 that Kik Messenger accesses user contacts in order to connect users with each other. Indeed,
21 Plaintiffs—who purport to have had a keen interest in the security of their iDevices and followed
22 closely news from Apple and traditional and non-traditional media sources regarding that topic—
23 cannot be considered to have had a reasonable expectation that Kik Messenger would not access
24 their contacts after so many disclosures to the contrary in the media, Kik’s own Terms of Use and
25 Privacy Policy, and within the App itself. In addition, any supposed intrusion into Plaintiffs’
26 privacy was not “highly offensive.” Kik Messenger is a *social networking* app that only functions
27 if a user has built his or her *social network*. Kik’s upload of phone numbers and email addresses
28 in connection with its provision of services to Plaintiffs is not “highly offensive” in these

1 circumstances.

2 Second, Plaintiffs' conversion claim fails because, among other reasons detailed in other
3 App Developer briefs (in which Kik joins), Plaintiffs failed to plead that Kik *dispossessed* them
4 of their address book data.

5 Third, Plaintiffs' claims should be dismissed for lack of Article III standing because they
6 failed to allege the "irreducible constitutional minimum" of a "concrete and particularized"
7 injury-in-fact. It is not enough, under any established law, for Plaintiffs to allege in general terms
8 that address book data can be "private" and then presume that they were automatically harmed
9 when the App uploaded some of that data. Nor is it sufficient for Plaintiffs to allege that Kik
10 somehow benefitted from their address book data when it simply enabled Plaintiffs to find their
11 own friends on the App. Plaintiffs must allege an *injury to themselves* resulting from that data
12 upload. The SCAC contains no such allegations.

13 Plaintiffs have failed in their multiple attempts to plead a claim against Kik, and Kik now
14 respectfully requests that the claims against it be dismissed with prejudice.

15 **II. STATEMENT OF FACTS**

16 Kik is a start-up company that developed and offers for download a popular and free
17 instant-messaging application for smart phones called Kik Messenger. Kik Messenger allows its
18 users to "chat" and "message" with others who have also downloaded the App. The *Opperman*
19 Plaintiffs assert claims on behalf of a putative class of persons who downloaded Kik Messenger
20 on their Apple iDevices between July 10, 2008 and February 2012. (SCAC, ¶ 233.)¹ Two of the
21 named plaintiffs, Stephanie Dennis-Cooley and Jason Green, allegedly downloaded Kik
22 Messenger. Although (unlike other Plaintiffs) the Kik Plaintiffs *fail* to specify when they
23 downloaded the App (*compare* SCAC, ¶¶ 159, 172, *with* SCAC, ¶¶ 184, 190), they claim to have
24 installed the App before they filed their initial complaint on March 12, 2012.

25 Plaintiffs allege that, at some unspecified point, "[w]ithout prior user consent, [Kik]
26 uploaded iDevice address book data" and that Apple knew this was happening because it was

27 ¹ This allegation is directed at all Defendants, not Kik specifically. The Kik Messenger App was
28 released in October 2010.

1 disclosed in “numerous reports”. (*Id.* at ¶¶ 100–01). Both Plaintiffs “recall using the Kik
 2 Messenger App, logging in, and navigating within the App.” (*Id.* at ¶ 102.) Plaintiffs allege that
 3 “Kik Interactive benefited substantially from its misappropriations of users’ address books,”
 4 which Plaintiffs claim allowed Kik to “more rapidly grow its user base, avoid the costs of
 5 customer acquisition, enhance its social networking features, and increase the value of the
 6 company.” (*Id.* at ¶ 103.) Based on these allegations, Plaintiffs assert claims for invasion of
 7 privacy (intrusion upon seclusion) and conversion.

8 **III. APPLICABLE LEGAL STANDARDS**

9 The Court is familiar with the applicable legal standards on a motion to dismiss under
 10 rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure. (Order Granting in Part and
 11 Denying in Part Defendants’ Motion to Dismiss (Dkt. 471) (“Order”), pp. 8–9.) As detailed
 12 below, Plaintiffs’ claims fail both because Plaintiffs have not alleged a “plausible” claim to relief,
 13 *see Ashcroft v. Iqbal*, 556 U.S. 662, 677–81 (2009), and because Plaintiffs have failed to plead a
 14 concrete and particularized injury-in-fact, *see Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–
 15 61 (1992).

16 **IV. ARGUMENT²**

17 **A. Plaintiffs Fail to State a Claim for Intrusion Upon Seclusion**

18 California courts have recognized tort claims for “intrusion upon seclusion” where a
 19 defendant intrudes into a “private place, conversation, or matter” in a “highly offensive” manner.
 20 *See Shulman v. Grp. W Prods., Inc.*, 18 Cal. 4th 200, 231 (1998). Intrusion cases typically
 21 involve unauthorized video or audio recordings by the media, or physical intrusions during
 22 sensitive situations such as medical exams;³ we are not aware of any California court permitting

23 _____
 24 ² In its Order, the Court noted that it had not identified any differences between California and
 Texas in relation to the common law claims, and confined its discussion to California law.
 (Order, p. 2, fn. 4.) This Motion therefore addresses only California law.

25 ³ *See, e.g., Shulman*, 18 Cal. 4th at 230–31 (intrusion cause of action “encompasses unconsented
 26 [] physical intrusion into the home, hospital room or other place the privacy of which is legally
 27 recognized, as well as unwarranted sensory intrusions such as eavesdropping, wiretapping, and
 28 visual or photographic spying”); *Miller v. Nat’l Broad. Co.*, 187 Cal. App. 3d 1463, 1484 (1986)
 (“In our view, reasonable people could regard the NBC camera crew’s intrusion into Dave
 Miller’s bedroom at a time of vulnerability and confusion occasioned by his seizure as ‘highly

1 an intrusion claim under circumstances similar to those alleged here, and to do so would broadly
 2 expand the scope of the claim. This is particularly true because, here, Plaintiffs failed to allege
 3 the required elements of the claim, which are: (1) plaintiff had a reasonable expectation of
 4 privacy; (2) the defendant intentionally intruded on that expectation of privacy; (3) the
 5 defendant's intrusion would be highly offensive to a reasonable person; (4) the plaintiff was
 6 harmed; and (5) the defendant's conduct was a substantial factor in causing plaintiff's harm. *See*
 7 Judicial Counsel of California Civil Jury Instructions ("CACI") 1800.

8 **1. Plaintiffs fail to plead that they had a reasonable expectation of**
 9 **privacy in their address books under the circumstances alleged.**

10 Plaintiffs fail to plead any facts establishing that they had an actual, objectively reasonable
 11 expectation that Kik would not access or upload data from their address books. *See Four Navy*
 12 *Seals v. Associated Press*, 413 F. Supp. 2d 1136, 1146 (S.D. Cal. 2005) ("To prevail on the first
 13 element of the tort of intrusion upon seclusion, a plaintiff must show: (a) an actual, subjective
 14 expectation of seclusion or solitude, and (b) that the expectation was objectively reasonable.").
 15 While Plaintiffs generally allege that they "have reasonable expectations of privacy in their
 16 iDevices and their mobile address books," (SCAC, ¶ 244), and refer to articles stating that certain
 17 percentages of the population at large would not want an app to access their contacts (*id.* at ¶ 57),
 18 Plaintiffs failed to plead that they had any expectation that if they downloaded an application that
 19 only worked if users established a network of contacts, that application would not access their
 20 contacts in order to help them build that network so that it could function properly. Their general
 21 allegations regarding an expectation of privacy, which merely parrot the elements of their

22
 23 offensive' conduct...."); *Deteresa v. Am. Broad. Cos., Inc.*, 121 F.3d 460, 466 (9th Cir. 1997)
 24 (holding that recording of conversation without plaintiff's consent was insufficient to state an
 25 intrusion claim, noting that it is not "a case in which a news team entered someone's bedroom
 26 without authorization ... [n]or is it a case in which someone gained entrance into another's home
 27 by subterfuge ... [n]or is it a case in which a private investigator obtained entrance into a hospital
 28 room by deception"); *Sanchez-Scott v. Alza Pharm.*, 86 Cal. App. 4th 365, 377-78 (2001)
 (performance of a breast examination where plaintiff was required to take off her blouse and bra
 without revealing that a second man present was a drug salesperson and not medical personnel
 was sufficient to state claim for intrusion).

1 intrusion claim without offering any factual support, are insufficient to allege this element. *See*
 2 *Twombly*, 550 U.S. at 555–56; *Iqbal*, 129 S. Ct. at 1949.

3 Even assuming that Plaintiffs had alleged they had a subjective expectation of privacy,
 4 they failed to establish that such expectation was objectively reasonable in light of their
 5 admission that Kik *publicly disclosed* that its Messenger App uploaded address book data.
 6 Indeed, Plaintiffs’ own pleadings confirm that Kik and third parties publicly disclosed the App’s
 7 upload of user address book data almost immediately after its release:

- 8 • Plaintiffs original Complaint⁴ alleged that Kik’s CEO publicly admitted to
 9 “access[ing]” and “scan[ing]” its users’ address book data just 17 days after the
 App was released.⁵ (Complaint (Dkt. 1), ¶¶ 280–82).
- 10 • Plaintiffs’ First Amended Complaint (“FAC”) included references to multiple
 11 publicly-available news sources that disclosed Kik’s access of address book data.
 12 (FAC (Dkt. 3), ¶ 205.) For example, the FAC cites an article that was published
 12 days after the App was released and over eighteen months before Plaintiffs filed
 13 suit, which stated that “[o]nce you download the application . . . it checks your
 14 address book and recommends friends and other contacts you are likely to know
 15 who have already downloaded Kik.”⁶ The FAC also quotes from an article that
 describes how Kik “automatically ingests your contacts from the device” to match
 16 you with potential contacts.⁷ Indeed, the FAC spent twenty paragraphs discussing
 17 information about Kik’s address book data practices that was publicly-available as
 of November 2010—just weeks after Kik Messenger launched. (*Id.* at ¶¶ 204–25.)
- 18 • Plaintiffs’ Second Amended Complaint (Dkt. 103) (“SAC”) likewise conceded
 19 that Kik had informed users of its actions before any other defendant, and once
 again cited publicly available news stories about the App. (SAC, ¶¶ 137, 161.)
- 20 • Plaintiffs’ Consolidated Amended Complaint (Dkt. 362) (“CAC”) once again
 admitted that media reports in 2010 disclosed Kik’s actions and provided links to
 21 media disclosures. (CAC, ¶¶ 216, 246.)

22 ⁴ Plaintiffs’ allegations from their prior complaints may be considered when deciding the instant
 23 motion. *See Robinson v. Salazar*, 885 F. Supp. 2d 1002, 1024 n.12 (E.D. Cal. 2012). *See also*
 24 *Andrews v. Metro N. Commuter R.R. Co.*, 882 F.2d 705, 707 (2d Cir. 1989); *Owens v. Kings*
 25 *Supermarket*, 198 Cal. App. 3d 379, 383–84 (1988) (court can take notice of facts that are omitted
 26 from amended complaint to prevent plaintiff from avoiding defects in prior complaint).

27 ⁵ The thread shown in the Complaint’s screenshot can be found at <http://www.quora.com/Is-it-against-Apples-terms-to-automatically-without-permission-upload-your-iPhones-address-book>.

28 ⁶ FAC, ¶ 205 n.136 (citing Matt Marshall, *Kik Messenger see explosive start – a mobile chat better than SMS?* (available at <http://venturebeat.com/2010/11/03/kik-messenger-sees-explosive-start-a-mobile-chat-better-than-sms/>)).

⁷ *Id.* at ¶ 205 n.135 (quoting Matt Marshall, *Kik, the Skype of text messages continues crazy growth* (chart) (available at <http://venturebeat.com/2010/11/05/kik-sms-growth/>) and Mathew Ingram, *Kik’s Viral Growth Comes With an Apology* (available at <http://gigaom.com/2010/11/09/kiks-viral-growth-comes-with-an-apology/>)).

- 1 • Plaintiffs’ SCAC admits that publicly-available news sources disclosed Kik’s
2 actions within days of the App’s launch. Plaintiffs allege that Apple knew Kik
3 was improperly uploading address book data because “reporters wrote up
4 numerous reports with titles like “Speedy Messaging App Kik Goes Viral, But is It
5 Cool With Apple’s T[erms] O[f] S[ervice]?” (SCAC, ¶ 101.) The article Plaintiffs
6 cite, *published eighteen months before this suit was filed*, discloses the very
7 actions on which Plaintiffs base their claim, stating that the Kik Messenger App
8 “automatically imports your contacts without asking for permission.”⁸

9 Moreover, as of November 15, 2010, Kik’s Terms of Use disclosed that, “When you
10 register for a Kik Account . . . Kik Messenger will access and upload the phone numbers and
11 emails [sic] addresses (but not names) from your mobile device address books to Kik’s servers.”⁹
12 (See Declaration of Peter Heinke In Support Of Motion to Dismiss (“Heinke Decl.”) Ex. A at 1.)
13 Similarly, Kik’s Privacy Policy explicitly advised users that, “When you register for a Kik
14 Account, Kik Messenger will use your address book contacts to help you connect with your
15 friends . . . Kik Messenger will access and upload the phone numbers and email addresses (but not
16 names) from your mobile device address book to Kik’s servers, hash it on our servers, and check
17 if those phone numbers and email addresses are registered to a Kik user.” (*Id.*, Ex. B at 1.)

18 Finally, as early as October 19, 2010, all users were presented with a disclosure during the
19 enrollment process stating that, if users provided their phone number to Kik (which was
20 *completely optional*) in addition to creating a username, Kik would use that phone number “to
21 find contacts in your address book who are already on Kik.” (*Id.*, Ex. C.) By December 6, 2010,
22 users were presented with an additional pop-up prompt stating that “‘Kik Messenger’ would like
23 to access your address book to match you with friends already on Kik” and given the option to
24 select “Don’t allow” or “OK.” (*Id.*, Ex. D.)

25 ⁸ SCAC, ¶ 101 (citing Alexis Tsotsis, *Speedy Messaging App Kik Goes Viral, But Is It Cool With*
26 *Apple’s TOS?* (available at <http://techcrunch.com/2010/11/08/kik/>)).

27 ⁹ Plaintiffs fail to allege that they downloaded Kik Messenger prior to the public statements
28 referenced in the SCAC and previous complaints. Indeed, Plaintiffs fail to specify anything about
their downloading or use of the App, and have repeatedly refused to provide Kik with their
usernames or any other information from which Kik can determine when they first registered.
The omission of these critical facts in an apparent attempt to avoid dismissal renders the SCAC
deficient. See *Plascencia v. Lending 1st Mortg.*, 583 F. Supp. 2d 1090, 1095 (N.D. Cal. 2008)
 (“On a motion under Rule 12(b)(6) . . . dismissal is appropriate only when the complaint does not
give the defendant fair notice of a legally cognizable claim and the grounds on which it rests.”);
Freeman v. ABC Legal Services, Inc., 827 F. Supp. 2d 1065, 1069 (N.D. Cal. 2011) (to survive
12(b)(6) motion to dismiss, allegations must “provide Defendants fair notice of nature of
plaintiff’s claims and the grounds on which the claims rest”) (citing *Twombly*, 550 U.S. at 555).

1 Given Plaintiffs’ own citation to numerous public disclosures of Kik’s address book data
2 activities within weeks of the App’s launch, they have not and cannot plead they had an
3 “objectively reasonable expectation of seclusion or solitude in the place, conversation or data
4 source.” Indeed, Plaintiffs themselves allege a particular interest in the “safety and security” of
5 Apple products. Plaintiff Dennis-Cooley alleges that she “generally reads or watches both
6 traditional and non-traditional media, and is exposed to marketing and publicity in a variety of
7 forms. Through that exposure, Dennis-Cooley has viewed numerous advertisements *and reports*
8 about Apple’s safety and security.” (SCAC, ¶ 163(i) (emphasis added).) Similarly, Plaintiff
9 Green alleges that he “generally reads or watches both traditional and non-traditional media” and
10 has “viewed numerous advertisements and reports about Apple’s safety and security.” (*Id.* at
11 ¶ 176.) These two Plaintiffs, who purport to have been interested in and reviewed media reports
12 about the security of Apple’s products, cannot reasonably have an expectation of privacy when
13 Kik’s address book data activities, and Apple’s response to those activities, was publicly
14 disclosed. These public disclosures defeat Plaintiffs’ intrusion claim. *See Hill v. Nat’l Collegiate*
15 *Athletic Ass’n*, 7 Cal. 4th 1, 36 (1994) (advanced notice of practices may “inhibit reasonable
16 expectations of privacy”); *In re Google, Inc. Privacy Policy Litig.*, No. C-12-01382-PSG, 2013
17 WL 6248499, at *15–16 (N.D. Cal. Dec. 3, 2013) (“*Google Privacy Policy I*”) (dismissing claim
18 for intrusion upon seclusion when the privacy policy explicitly stated contact information and
19 geolocation data would be collected). Because Plaintiffs fail to allege that they downloaded the
20 App *before* the public disclosures described in their own pleadings were made, they have failed to
21 plausibly allege they had an actual, objectively reasonable expectation of privacy in their address
22 book data in connection with their use of Kik Messenger and their claims should be dismissed.

23 **2. Plaintiffs fail to plead that Kik’s conduct was highly offensive.**

24 Plaintiffs’ intrusion claim also fails because Kik’s alleged conduct—uploading address
25 book data after disclosing it would do so—does not pass the preliminary determination of
26 “offensiveness.” *See Miller*, 187 Cal. App. 3d at 1483 (court makes “a preliminary determination
27 of ‘offensiveness’” to determine whether a cause of action for intrusion exists). Whether an
28 intrusion is highly offensive depends on “the degree of intrusion, the context, conduct and

1 circumstances surrounding the intrusion as well as the intruder’s motives and objectives, the
2 setting into which he intrudes, and the expectations of those whose privacy is invaded.” *Id.* at
3 1483–84. Here, considering the totality of the circumstances in which Kik is alleged to have
4 uploaded certain fields of address book data, it is clear that the nature of the intrusion is not
5 “highly offensive,” for at least three reasons.

6 First, the uploading of Plaintiffs’ address book data is not highly offensive because
7 Plaintiffs were aware of, and consented to, this action. As described *supra*, the fact that Kik
8 uploaded address book data was widely publicized—it was the topic of a number of news articles
9 and was disclosed within the App during the enrollment process and in Kik’s Terms of Use and
10 Privacy Policy. Moreover, Plaintiffs do not allege that Kik lied to them or misrepresented the
11 functionality of the App. Accordingly, Kik’s alleged “intrusion” cannot be deemed highly
12 offensive. *See Baugh v. CBS, Inc.*, 828 F. Supp. 745, 757 (N.D. Cal. 1993) (dismissing intrusion
13 claim because “consent is an absolute defense”).

14 Second, the circumstances surrounding Kik’s uploading of portions of address book data
15 weigh against a finding that the “intrusion” was highly offensive. Kik is a mobile messaging
16 platform that allows users to communicate across operating systems, carriers, and continents. A
17 messaging App with no potential recipients serves no purpose. Plaintiffs concede that one
18 purpose of the contacts scanning was to “enhance [Kik’s] social networking features.” (SCAC,
19 ¶ 103.) Plaintiffs have previously alleged that they have “more than one hundred contacts on
20 their iDevices.” (SAC, ¶ 77.) If Kik had not scanned their address book, each of these contacts
21 would have to be entered manually. Indeed, Plaintiffs fail to allege that, had they known that Kik
22 Messenger would upload information from their contacts, they would not have used that feature
23 or would not have downloaded the App. This strongly suggests that, for Plaintiffs, the utility of
24 Kik’s free messaging app, and the convenience of letting Kik quickly and automatically find
25 friends for Plaintiffs, outweighed any intrusion into their privacy. Kik’s actions, made in
26 connection with Kik’s provision of requested services to users, were not therefore “highly
27 offensive.”

28 Critically, Plaintiffs do not allege that Kik retained, disclosed, or otherwise misused their

1 address book data—which allegations formed the basis of this Court’s prior order concluding
2 Plaintiffs had stated a claim for intrusion. (Order, p. 44.) Plaintiffs’ only allegation regarding
3 Kik’s use of their data in the operative complaint now is that Kik scanned their contacts to “more
4 rapidly grow its user base, avoid the costs of customer acquisition, enhance its social networking
5 features, and increase the value of the company.” (SCAC, ¶ 103). That Kik allegedly benefitted
6 from the improved functionality of the app does not, however, make its conduct highly offensive.
7 *See Folgelstrom v. Lamps Plus, Inc.*, 195 Cal. App. 4th 986, 992–93 (2011) (unauthorized
8 collection of PII for marketing purposes is not highly offensive because it is “routine commercial
9 behavior”); *see also In re Google, Inc. Privacy Policy Litig.*, No. 12-cv-01382-PSG, 2014 WL
10 3707508, at *12 (N.D. Cal. July 21, 2014) (“*Google Privacy Policy II*”) (using PII to serve
11 targeted ads not highly offensive); *Yunker v. Pandora Media, Inc.*, No. 11-cv-031130JSW, 2013
12 WL 1282980, at *14–15 (N.D. Cal. Mar. 26, 2013) (profiting from sale of PII to third parties not
13 “an egregious breach of social norms”); *Low v. LinkedIn Corp.*, 900 F. Supp. 2d 1010, 1025
14 (N.D. Cal. 2012) (same).

15 Third, Plaintiffs’ address book data is not the type of highly sensitive information that
16 gives rise to an actionable claim for intrusion. The bar is set “high” to state a claim for intrusion.
17 *Belluomini v. Citigroup Inc.*, No. 13-cv-01743-CRB, 2013 WL 3855589, at *6 (N.D. Cal. July 24,
18 2013); *Low*, 900 F. Supp. 2d at 1025. “Even disclosure of personal information, including social
19 security numbers, does not constitute an ‘egregious breach of the social norms’ to establish an
20 invasion of privacy claim.” *Low*, 900 F. Supp. 2d at 1025. Here, the relevant address book data
21 (email addresses and phone numbers) is indistinguishable from the types of personal
22 identification information that courts routinely hold as being insufficient to state a claim for
23 intrusion. *See In re iPhone Application Litig.*, 844 F. Supp. 2d 1040, 1063 (N.D. Cal. 2012)
24 (“*iPhone II*”) (collection of personal data and geolocation information insufficient); *Yunker*, 2013
25 WL 1282980, at *15 (collection of age, gender, and location); *In re Google Android Consumer*
26 *Privacy Litig.*, No. 11-md-02264-JSW, 2013 WL 1283236, at *11 (N.D. Cal. Mar. 26, 2013)
27 (“*Google Android*”) (collection of app activity); *Low*, 900 F. Supp. 2d at 1025 (collection of
28 browser history); *see also Puerto v. Super. Ct.*, 158 Cal. App. 4th 1242, 1253 (2008) (“[T]he

1 requested information, while personal, is not particularly sensitive, as it is merely contact
2 information, not medical or financial details, political affiliations, sexual relationships, or
3 personnel information.”). In addition, even if Plaintiffs’ address book data theoretically could
4 include confidential or sensitive information, Plaintiffs failed to allege what specific confidential
5 or sensitive information was in their address book data and uploaded by Kik. This deficiency,
6 too, defeats their intrusion claim. *See In re Yahoo Mail Litig.*, No. 13-cv-04980, 2014 WL
7 3962824, at *16 (N.D. Cal. Aug. 12, 2014) (holding that plaintiffs alleging privacy interest in
8 communications must allege with specificity the confidential material in the content of those
9 communications).

10 **3. Plaintiffs suffered no harm as a result of Kik’s alleged intrusion.**

11 To state an actionable claim for intrusion, Plaintiffs must also plead that they suffered an
12 injury as a result of Kik’s alleged intrusion. (*See* Order, p. 46.) *See also* CACI 1800. Plaintiffs
13 plead no facts establishing that they suffered any harm. Indeed, Plaintiffs fail to allege that they
14 suffered “anxiety, embarrassment, [or] humiliation.” (*See* Order, p. 46.) Rather, they only plead,
15 in wholly conclusory fashion, that “[a]s a direct and proximate result of the respective App
16 Defendants’ actions, Plaintiffs suffered harm and damages.” (SCAC, ¶ 248.) This conclusory
17 allegation is insufficient to establish harm.

18 **B. Plaintiffs Lack Article III Standing for Their Intrusion Claim.**

19 Plaintiffs allege that Kik “uploaded iDevice address book data to Kik Interactive or
20 someone acting on its behalf. As a consequence, Kik Interactive improperly obtained the address
21 book data belonging to Plaintiffs and class members.” (SCAC, ¶ 100.) This allegation—that Kik
22 “took [the Kik Plaintiffs’] address book data without . . . consent,” (*see, e.g., id.* at ¶¶ 159, 172),
23 coupled with general allegations (specific to no Plaintiff) that iDevice address books contain
24 “highly personal and private” information—is the sum total of Plaintiffs’ privacy-related injury
25 allegations. In other words, Plaintiffs claim that Kik’s electronic act of accessing Plaintiffs’
26 address books, alone, constitutes Article III injury in fact. Plaintiffs’ theory is legally untenable.

27 Article III requires some “concrete and particularized” injury suffered as a result of the
28 alleged privacy violation itself. Indeed, the cases cited in the Court’s Order show just how

1 different those cases are from the case at bar. *See Ruiz v. Gap, Inc.*, 380 Fed. App'x. 689, 691
2 (9th Cir. 2010) (plaintiffs alleged a “greater risk of identity theft” as a result of the violation);
3 *Citizens for Health v. Leavitt*, 428 F.3d 167, 176 & n.9 (3d Cir. 2005) (plaintiffs submitted
4 evidence that “at least one individual plaintiff’s health information has been, or will imminently
5 be, disclosed without her consent by private health care providers and drugstore chains, and that
6 she and her family will avoid seeking medical care to prevent further disclosures of medical
7 information without their consent.”).

8 Plaintiffs here allege no such circumstances. Plaintiffs do not allege that Kik’s access to
9 their address books somehow increased a risk of identity theft or disclosure to third parties (or
10 even that any human ever saw the contents of their address books). On the contrary, Plaintiffs
11 have abandoned their “public disclosure” theory. Plaintiffs do not allege a violation of any
12 constitutional or statutory privacy right. In fact, Plaintiffs do not even allege that, had they
13 known that Kik would access their contacts, they would not have downloaded the app. (*See*
14 *SCAC*, ¶¶ 161, 174 (alleging that Plaintiffs would have paid less for their iPhone if they had
15 known that the contacts could be accessed or copied by others, but failing to allege they would
16 not have downloaded Kik Messenger).)

17 Simply put, Plaintiffs fail to allege any concrete *consequence* of the Kik’s electronic
18 access of their contact address book—much less any injury resulting from that access. This is
19 insufficient to create Article III standing. *See, e.g., Yunker*, 2013 WL 1282980, at *4 (holding
20 that constitutional privacy violation created Article III standing, but rejecting argument that
21 access and disclosure alone created Article III standing); *In re Apple iPhone Application Litig.*,
22 No. 11-md-02250-LHK, 2011 WL 4403963, at *4–5 (N.D. Cal. Sept. 20, 2011) (“*iPhone I*”)
23 (dismissing privacy claims for lack of Article III standing where plaintiffs “have not identified a
24 concrete harm from the alleged collection and tracking of their personal information sufficient to
25 create injury in fact.”); *LaCourt v. Specific Media, Inc.*, No. 10-cv-1256-GW(JCGx), 2011 WL
26 1661532, at *4–5 (N.D. Cal. Apr. 28, 2011) (no standing where failed to “give some
27 particularized example” of how the collection of plaintiffs’ browsing history “deprived Plaintiffs
28 of this information’s economic value”); *In re DoubleClick, Inc. Privacy Litig.*, 154 F. Supp. 2d

1 497, 525 (S.D.N.Y. 2001) (“[A]lthough demographic information is valued highly ... the value of
2 its collection has never been considered a[n] economic loss to the subject.”); *Google Android*,
3 2013 WL 1283238, at *4; *Google Privacy Policy I*, 2013 WL 6248499, *5 (Google’s alleged
4 combining and comingling of Plaintiffs’ information did not establish an injury-in-fact). As such,
5 their intrusion claim should be dismissed for lack of standing.

6 **C. Plaintiffs’ Conversion Claim Should Be Dismissed For Failure to State a**
7 **Claim and for Lack of Article III Standing.**

8 Plaintiffs’ conversion claim likewise fails for failure to state a claim under Federal Rule of
9 Civil Procedure 12(b)(6) and for lack of Article III standing. Because Plaintiffs’ allegations
10 against Kik with respect to the conversion claim are materially indistinguishable from those
11 against other App Developer Defendants, including Instagram, Kik joins and incorporates by
12 reference Instagram’s arguments and legal authority regarding Plaintiffs’ failure to state a
13 conversion claim or plead injury-in-fact resulting from the alleged conversion.

14 **D. Plaintiffs’ Claims Against Kik Should Be Dismissed With Prejudice.**

15 Plaintiffs have had nearly three years and five complaints to attempt to plead a claim
16 against Kik. They cannot, and Kik requests that the claims against it be dismissed with prejudice.
17 *See Low*, 900 F. Supp. 2d at 1033 (dismissing claims with prejudice “because any amendment
18 would likely be futile”); *Allen v. City of Beverly Hills*, 911 F.2d 367, 373 (9th Cir. 1990) (a
19 “court’s discretion to deny leave to amend is particularly broad where plaintiff has previously
20 amended the complaint”) (citation and quotation omitted).

21
22
23
24
25
26
27
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

V. CONCLUSION

For the above-stated reasons, Kik respectfully requests that the Court dismiss Plaintiffs' claims against it with prejudice.

Dated: August 22, 2014

COOLEY LLP

/s/ Mazda K. Antia

Mazda K. Antia

Attorneys for Plaintiffs KIK Interactive, Inc.